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10
11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA

13 ROBERT McCOY, individually and on behalf
14 of all others similarly situated,

15 Plaintiff,

16 v.

17 18 ALPHABET INC., et al.,
19 Defendants.

Case No. 5:20-cv-05427-SVK

**DEFENDANT GOOGLE LLC'S NOTICE
OF MOTION AND MOTION TO
DISMISS CLASS ACTION COMPLAINT**

Judge: Hon. Susan van Keulen

Hearing: December 8, 2020

Time: 10:00 a.m.

Place: Courtroom 6 – 4th Floor
280 South 1st Street
San Jose, CA 95113

Date Filed: August 5, 2020

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1 TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on December 8, 2020, at 10:00 a.m., in Courtroom 6 of the
3 above-captioned Court, located at 280 South 1st Street, 4th Floor, San Jose, California 95113,
4 defendant Google LLC (“Google”) will, and hereby does, move for an order dismissing Plaintiff
5 Robert McCoy’s Class Action Complaint in its entirety and with prejudice.¹

6 Google brings this motion under Rule 12(b)(1) of the Federal Rules of Civil Procedure on
7 the ground that the Complaint fails to plead facts sufficient to establish Article III standing and
8 under Rule 12(b)(6) on the ground that the Complaint fails to state any claim upon which relief
9 can be granted. This motion is based on this Notice of Motion, the following Memorandum of
10 Points and Authorities, Google’s Request for Judicial Notice, the Declaration of Christina Lee
11 with the exhibits attached thereto, and on all pleadings and papers on file or to be filed in the
12 above-entitled action, on the arguments of counsel, and on any other matters that may properly
13 come before the Court for its consideration.

14
15 Dated: September 30, 2020

KEKER, VAN NEST & PETERS LLP

16
17 By: /s/ Benjamin Berkowitz
18 BENJAMIN BERKOWITZ
19 THOMAS E. GORMAN
CHESSIE THACHER
CHRISTINA LEE

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21 Attorneys for Defendant
22 GOOGLE LLC

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28 ¹ Plaintiff Robert McCoy voluntarily dismissed defendant Alphabet, Inc. on September 8, 2020.
See ECF No. 21.

MEMORANDUM OF POINTS AND AUTHORITIES²

I. INTRODUCTION

Plaintiff Robert McCoy’s Complaint is a tangle of internally inconsistent and insufficiently pleaded allegations. At the core of the Complaint, however, is the charge that Google “secretively” collects information about how users on the Android platform interact with third-party apps. But the Complaint acknowledges that this is a practice that Google discloses through its Privacy Policy and for which it obtains users’ consent. Thus, McCoy’s Complaint fails as a matter of law.

The Court should dismiss McCoy's Complaint in its entirety because McCoy has not alleged a cognizable injury and has therefore failed to establish standing under Article III. To the extent Google collected any third-party-app usage information, McCoy consented to that collection. McCoy's allegation that his consent was not "meaningful" asks this Court to ignore a plain reading of the Google terms and policies upon which his Complaint relies. This disclosure and consent therefore doom the Complaint and require dismissal under either Rule 12(b)(1) or Rule 12(b)(6) of the Federal Rules of Civil Procedure.

The individual claims in the Complaint also fail for additional, independent reasons under Rule 12(b)(6):

McCoy’s privacy-related claims are all terminally flawed. *See Counts I, II, IV, XI.* McCoy fails to state a claim for violation of his constitutional and common-law privacy rights because he fails to allege even a bare privacy violation, much less the type of “egregious” or “highly offensive” conduct that would satisfy the “high bar” required under California law. McCoy also fails to state any statutory claims under the California Invasion of Privacy Act (“CIPA”) or the California Consumer Privacy Act (“CCPA”) because these statutes are inapplicable to the conduct alleged. CIPA is a criminal statute that does not apply either to information consensually obtained or to routine commercial data, such as the app-usage statistics at issue here. *See* Cal. Penal Code § 631. And the CCPA simply does not provide a private right

² Throughout this brief, unless otherwise stated, emphases are added to quotations, and internal punctuation, alterations, and citations are omitted therefrom.

1 of action except in specific circumstances (a data breach) that are also not present here. *See* Cal.
 2 Civ. Code §§ 1798.100 *et seq.*

3 McCoy's fraud-based claims all fail because McCoy does not allege that Google collects
 4 any information other than what Google properly discloses in its Privacy Policy. *See* Counts III,
 5 V, VI. He therefore fails to plead a false statement by Google, reliance upon any such statement,
 6 or economic harm. McCoy's California Legal Remedies Act ("CLRA") claim fails for the same
 7 reasons, and also because McCoy does not allege any qualifying transaction under the statute and
 8 does not satisfy the CLRA's procedural requirements. *See* Cal. Civ. Code §§ 1750 *et seq.*
 9 Likewise, given that McCoy has failed to state a claim for any unlawful, unfair, or fraudulent
 10 business practice, and has failed to allege any resulting economic harm, McCoy cannot state a
 11 claim under California's Unfair Competition Law ("UCL"). *See* Cal. Bus. & Prof. Code § 17200.

12 McCoy's contract and quasi-contract claims also fail. *See* Counts VII, VIII, IX. The
 13 breach-of-contract claim fails because McCoy has not identified any provision in Google's Terms
 14 of Service ("TOS") that it breached. McCoy's claims for breach of implied contract and unjust
 15 enrichment fail because neither of these quasi-contract claims can survive alongside the TOS.

16 Finally, McCoy's claim under the Declaratory Judgment Act is derivative of his other
 17 claims. *See* Count X. Thus, it fails for the same reasons as his other claims.

18 McCoy's Complaint should be dismissed in its entirety and with prejudice.

19 **II. BACKGROUND**

20 **A. Allegations about Google's collection of third-party-app usage data.**

21 According to his Complaint, Plaintiff Robert McCoy lives in New York and owns a
 22 Google Pixel XL Android smartphone. Compl. ¶¶ 11, 19. McCoy filed this putative class action
 23 shortly after the website *The Information* published what he characterizes as a "bombshell
 24 report." *Id.* ¶ 23.³ Based on this article, McCoy alleges that Google maintains an "undisclosed"
 25 program called "Android Lockbox." *Id.* ¶ 24. Google purportedly uses this program to collect
 26 certain app-usage data from users of its Android mobile operating system when those users

27
 28 ³ *See also* Ex. 1 to the Declaration of Christina Lee in Support of Google's Request for Judicial
 Notice. All exhibits attached to the Lee Declaration are hereinafter referred to as an "RJN Ex."

1 “interact with non-Google applications” on their phones. *Id.* ¶ 4. Specifically, McCoy avers that
 2 Google can collect “data on when and how often an Android Smartphone user opens and runs
 3 non-Google apps and the amount of time spent in non-Google apps” while on Google’s Android
 4 platform. *Id.* ¶ 25. This data is useful for many purposes, such as a “feature on Android that
 5 redirects battery power to the apps that people use more frequently.” RJD Ex. 1 at 2. But McCoy
 6 asserts that, even though Google claims to collect this third-party-app usage data to provide users
 7 with “a more personalized experience” and “better services,” these statements are “objectively
 8 false” because Google really uses this “sensitive personal data” to develop “competing apps
 9 against its competitors.” Compl. ¶¶ 1, 28–30, 33–38, 101–02.

10 **B. Google discloses that it may collect third-party-app usage data.**

11 Google’s Privacy Policy discloses that it may collect data regarding users’ activity on
 12 third-party apps. Compl. ¶¶ 40, 143. In particular, the Privacy Policy states: “We collect
 13 information about your activity in our services, which we use to do things like recommend a
 14 YouTube video you might like.” RJD Ex. 2A at 3; *see also* RJD Exs. 2C–D. The Privacy Policy
 15 makes clear that the information Google collects may include, among other categories, “**activity**
 16 **on third-party sites and apps that use our services.**” RJD Ex. 2A at 3.; *see also* *id.* at 16
 17 (reiterating that Google collects “Internet, network, and other activity information such as . . .
 18 activity on third-party sites and apps that use our services”).

19 Although McCoy baldly alleges that Google does **not** disclose that it collects data to help
 20 develop its own services (*see, e.g.*, Compl. ¶ 38), Google’s Privacy Policy explains in a section
 21 entitled “Why Google Collects Data” that Google uses “data to build better services” (RJD Ex.
 22 2A at 5–7). The Privacy Policy elaborates that building “better services” includes using data to
 23 “maintain & improve our services,” “develop new services,” “provide personalized services,
 24 including content and ads,” “measure performance,” and “protect Google, [its] users, and the
 25 public.” *Id.* The Privacy Policy also highlights that Google may use the information that it
 26 collects for “business purposes,” such as “to improve our services and to develop new products,
 27 features and technologies that benefit our users and the public.” *Id.* at 17.

1 **C. Users have the option to share third-party-app usage data with Google.**

2 Google's Privacy Policy advises all users that the information Google "collects, and how
 3 that information is used, depends on how you use our services and how you manage your privacy
 4 controls." RJD Ex. 2A at 2. With respect to third-party-app usage data, users have the option of
 5 choosing to share this data with Google when they set up their devices. RJD Ex. 1 at 4. As
 6 explained in the article incorporated into McCoy's Complaint, "when people set up Google
 7 services on their Android devices," they receive a "prompt" enabling them to "choose to share
 8 their activity on the apps they use" with Google. *Id.*; *see also* Compl. ¶ 33.

9 Google also provides users with options to control third-party-app usage data after setting-
 10 up a device. The Privacy Policy, for example, specifically informs users that, "[d]epending on
 11 your account settings, your activity on other sites and apps may be associated with your personal
 12 information in order to improve Google's services." RJD Ex. 2A at 7; *see also* RJD Ex. 4 at 1
 13 (informing users how to "turn on or off" the sharing of usage and diagnostics data, such as "how
 14 often you use your apps"); RJD Ex. 5 at 1 (informing users that they "control whether app activity
 15 from your device is saved" and can turn "off or delete past activity at any time").

16 **D. Allegations about McCoy's third-party-app usage data.**

17 McCoy alleges that he agreed to Google's Terms of Service and that he is "subject to"
 18 Google's Privacy Policy. Compl. ¶¶ 138–40. The Complaint is silent, however, as to McCoy's
 19 Android settings and whether McCoy chose to share his third-party-app usage data with Google.
 20 Nonetheless, McCoy repeatedly asserts, in conclusory fashion, that Google collected "sensitive
 21 personal data" from him and other Android smartphone users without "meaningful consent."⁴
 22 McCoy does not specify the nature of this sensitive information; instead, he merely alleges that
 23 Google collected "his data related to TikTok," which could include the "frequency" with which
 24 he used TikTok and the "duration of time" he spent in the app on his phone. *Id.* ¶¶ 31, 40, 93,
 25 103, 113.

26
 27
 28 ⁴ See Compl. ¶¶ 1, 4–5, 22–23, 26–37, 42–43, 46–47, 51, 55, 57, 77–78, 81, 91–93, 95, 102, 104,
 106, 113–14, 116, 121, 123–24, 126–29, 131–32, 135, 143, 156, 160, 166–69, 171, 173.

1 **III. ISSUES TO BE DECIDED**

2 Whether the Complaint alleges facts sufficient to establish Article III standing under
 3 Federal Rule of Civil Procedure 12(b)(1) and whether the Complaint states a claim upon which
 4 relief can be granted under Federal Rule of Civil Procedure 12(b)(6).

5 **IV. LEGAL STANDARD**

6 **A. Motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1).**

7 Under Federal Rule 12(b)(1), the Court must dismiss any action that lacks subject-matter
 8 jurisdiction. At the center of the Court’s jurisdictional inquiry is Article III’s standing
 9 requirement. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). In order to establish
 10 Article III standing, the “plaintiff must have (1) suffered an injury in fact, (2) that is fairly
 11 traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a
 12 favorable judicial decision.” *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016).

13 **B. Motion to dismiss for failure to state a claim under Rule 12(b)(6).**

14 To survive a motion to dismiss under Federal Rule 12(b)(6), a plaintiff must plead facts
 15 showing that his right to relief rises above “the speculative level.” *Bell Atl. Corp. v. Twombly*,
 16 550 U.S. 544, 555 (2007). “Threadbare recitals of the elements of a cause of action, supported by
 17 mere conclusory statements, do not suffice,” and pleadings that are “no more than conclusions,
 18 are not entitled to the assumption of truth.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009). The
 19 Court also “need not” accept the truth of any allegations contradicted by matters properly subject
 20 to judicial notice. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).
 21 Dismissal without leave to amend is appropriate if “amendment would be futile.” *Carrico v. City*
 22 & *Cnty. of San Francisco*, 656 F.3d 1002, 1008 (9th Cir. 2011).

23 Additionally, where a complaint contains allegations that sound in fraud, “a party must
 24 state with particularity the circumstances constituting [the] fraud.” Fed. R. Civ. P. 9(b).
 25 “Averments of fraud must be accompanied by ‘the who, what, when, where, and how’ of the
 26 misconduct charged.” *Vess v. Ciba-Geigy Corp.*, 317 F.3d 1097, 1106 (9th Cir. 2003). “Any
 27 averments which do not meet that standard should be ‘disregarded,’ or ‘stripped’ from the claim
 28 for failure to satisfy Rule 9(b).” *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009).

1 **V. ARGUMENT**2 **A. The Complaint fails to plead facts sufficient to establish Article III standing**
3 **and should be dismissed under Rule 12(b)(1).**

4 To satisfy the “irreducible constitutional minimum of standing,” McCoy must establish an
5 injury that is “concrete and particularized, and actual or imminent, not conjectural or
6 hypothetical.” *Lujan*, 504 U.S. at 560–61. “A ‘concrete’ injury must be ‘*de facto*’; that is, it must
7 actually exist,” and cannot be “abstract.” *Spokeo*, 136 S. Ct. at 1548.

8 This Complaint reveals an Article III problem on its face because McCoy acknowledges
9 that he consented to share his third-party-app usage data with Google and that Google disclosed
10 how it might use that data. Such consent negates any possibility of injury.

11 Here, McCoy has failed to demonstrate any concrete and particularized injury because the
12 conduct that he complains about was fully disclosed in Google’s Privacy Policy. Not only does
13 McCoy admit that he is “subject to” this Privacy Policy (Compl. ¶ 140), he also admits that the
14 policy advises users that Google may collect information about “activity on third-party sites and
15 apps that use [Google’s] services” (*id.* ¶ 143; *see also* RJN Ex. 2A at 3). Having consented to
16 Google’s Privacy Policy, McCoy cannot now claim injury from conduct explicitly disclosed in
17 that policy (as discussed above and in further detail below).

18 In addition, documents incorporated into the Complaint demonstrate that Google does not
19 collect third-party-app usage data without user consent. *See* RJN Ex. 1 at 4; *see also* Compl.
20 ¶¶ 33–36. Because the Complaint admits McCoy consented to the Privacy Policy and also
21 confirms that, if McCoy’s third-party-app usage data was actually collected, he consented to that
22 collection, McCoy cannot claim he was injured by the collection. Indeed, it is axiomatic that he
23 “who consents to an act is not wronged by it.” Cal. Civ. Code § 3515. McCoy’s purported injury
24 is therefore hypothetical or conjectural at best, and neither sufficiently concrete nor particularized
25 to establish Article III standing. *See Spokeo*, 136 S. Ct. at 1548.

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1 **B. The Complaint should be dismissed under Rule 12(b)(6) because Google
2 discloses that it collects third-party-app usage data.**

3 Google's disclosures, and McCoy's consent, are also an absolute defense to all claims
4 under Rule 12(b)(6). In determining consent to "data tracking and collection practices," courts
5 consider "whether the circumstances, considered as a whole, demonstrate that a reasonable person
6 understood that an action would be carried out so that their acquiescence demonstrates knowing
7 authorization." *Smith v. Facebook, Inc.*, 745 F. App'x 8, 8 (9th Cir. 2018), *aff'g* 262 F. Supp. 3d
8 943 (N.D. Cal. 2017). The circumstances here demonstrate that—based on Google's Privacy
9 Policy and the process users go through when they set up their devices—a reasonable person
10 would understand that Google collects third-party-app usage data for a wide range of purposes,
11 including the development of new products and services, and that users have the option to decide
12 to share their data with Google. Such disclosure and consent defeat all of McCoy's claims under
13 Rule 12(b)(6). *See id.*, 262 F. Supp. 3d at 955–56 (dismissing claims with prejudice because
14 plaintiffs' consent to data collection "bars" their claims and "no amendment could change the fact
15 that Plaintiffs consented to Facebook's conduct").

16 **1. Google's disclosures are not "inadequate."**

17 As McCoy accurately recognizes (and quotes), Google's Privacy Policy informs users that
18 Google "collect[s] information to provide better services to all our users" and that some of the
19 information it collects may include "activity on third-party sites and apps that use our services."
20 Compl. ¶¶ 38, 143; *see also* RJD Ex. 2A at 3. McCoy also accurately recognizes that users "can
21 choose to share their activity on the apps they use" when they "set up Google services on their
22 Android devices" and doing so can, among other things, provide users with "a more personalized
23 experience." RJD Ex. 1 at 4; *see also* Compl. ¶ 33. Taken together, these facts conclusively
24 undermine McCoy's threadbare contention that "[n]owhere does Google explain, nor obtain
25 consent, to collect Android Smartphone users' data while users interact with non-Google apps
26 . . ." Compl. ¶ 40.

27 Google's specific disclosures about the collection of third-party-app usage data also
28 undermine McCoy's contention that Google's disclosures were inadequate or misleading. *See*,

1 *e.g.*, *id.* ¶¶ 1, 5, 33, 38, 39, 41–42, 49, 103. Google’s Privacy Policy indisputably discloses that
 2 Google collects information—including third-party-app usage information—for a wide range of
 3 purposes, such as to ensure that services are working as intended, to troubleshoot issues, to
 4 measure performance, and to improve reliability. RJD Ex. 2A at 5–8. The materials McCoy
 5 incorporated into his Complaint further acknowledge that Google collects third-party-app usage
 6 data to improve things like battery performance. RJD Ex. 1 at 2. McCoy therefore cannot
 7 credibly claim that he thought any information collected was “for the sole purpose of offering a
 8 more personalized experience.” Compl. ¶ 127. Nor, in light of these many benefits to users, can
 9 McCoy credibly allege that any information collected by Google was for the company’s “sole
 10 benefit.” *Id.* ¶ 128; *see also id.* ¶ 149.

11 Moreover, Google specifically disclosed exactly what McCoy says he did not know. At
 12 bottom, McCoy admits that he knew that Google could use third-party-app usage data to create
 13 “better services,” but alleges he did not realize that some of those services *might* compete in the
 14 marketplace. *Id.* ¶¶ 38, 42. Again, however, Google’s Privacy Policy explicitly explains that
 15 Google collects information to “**build better services**,” “maintain & improve” services, “**develop**
 16 **new services**,” and “provide personalized service.” RJD Ex. 2A at 5–7. To make things even
 17 clearer, when explaining the “Business purposes for which this information may be used or
 18 disclosed,” Google states that the information it collects may be used for “research and
 19 development,” including “to improve our services and to develop new products, features and
 20 technologies that benefit our users and the public.” *Id.* at 17.

21 Therefore, these disclosures make clear that Google’s collection of “[a]ctivity on third-
 22 party sites and apps that use [its] services” includes basic information as to what apps a user is
 23 using, as well as how frequently and for how long. *Id.* at 3. Indeed, McCoy fails to explain what
 24 “activity” or “app usage data” he thought Google would collect under the disclosures in the
 25 Privacy Policy or the device set-up process. *See id.*; RJD Ex. 1 at 4. These disclosures also make
 26 clear that Google may use this data not just to improve existing features and services, but also to
 27 develop “new” and “better services.” McCoy should not be permitted to attack the sufficiency of
 28 these disclosures by quoting only excerpts of Google’s terms and policies, and then pretending

that Google does not—in the very same materials—disclose the conduct about which he complains.

2. McCoy's consent to Google's collection of third-party-app usage data defeats all of the claims in the Complaint.

Given Google’s disclosures regarding its collection of third-party-app usage information on its Android operating system, McCoy cannot state a claim for invasion of privacy—whether under the California Constitution, the common-law tort of intrusion upon seclusion, CIPA, or the CCPA. Because Google discloses that it may collect information regarding user activity on third-party apps, Google has not, under the circumstances, intruded upon any user’s reasonable expectation of privacy in that information, and it certainly has not done so in a manner “highly offensive to a reasonable person.” *Hernandez v. Hillsides, Inc.*, 47 Cal. 4th 272, 286 (2009). Disclosure and consent also defeat McCoy’s CIPA claim under California Penal Code § 631 and his CCPA claim under California Civil Code § 1798.100. Neither of these statutes apply to the conduct alleged, but, even if they did, they prohibit only conduct performed without consent or authorization. *See* Cal. Penal Code § 631(a); Cal. Civ. Code § 1798.150.

For these same reasons, McCoy also cannot state any claim based on fraud under California Civil Code § 1709, the CLRA, or the UCL. These claims are grounded in allegations of deception, but McCoy cannot credibly allege that he was deceived into believing that Google would not collect third-party-app usage data when Google’s Privacy Policy expressly discloses that Google may collect this information and the device set-up process expressly seeks a user’s consent to do so. Likewise, Google’s disclosures defeat McCoy’s claims for breach of contract, breach of implied contract, and unjust enrichment because these claims are all predicated on Google’s purported failure to disclose its collection of third-party-app usage data. Finally, because consent defeats all of McCoy’s other claims, it defeats his derivative claim for declaratory judgment as well.

In sum, the entire Complaint should be dismissed with prejudice given the disclosures that McCoy's own allegations highlight. But even if the Complaint was not so fatally flawed, its claims would fail under Rule 12(b)(6) for the additional, independent reasons set forth below.

1 **C. McCoy fails to state a claim for invasion of privacy under the California
2 Constitution.**

3 “The California Constitution sets a ‘high bar’ for establishing an invasion of privacy
4 claim.” *In re Yahoo Mail Litig.*, 7 F. Supp. 3d 1016, 1038 (N.D. Cal. 2014). To clear this bar,
5 McCoy must plead: (1) a legally protected privacy interest; (2) a reasonable expectation of
6 privacy in the circumstances; and (3) a serious invasion of privacy constituting “an *egregious*
7 breach of . . . social norms.” *Hill v. Nat'l Collegiate Athletic Ass'n*, 7 Cal. 4th 1, 35–37 (1994).
8 Ensuring that a plaintiff pleads these “threshold elements” allows courts to “weed out” claims that
9 do not significantly intrude upon “a constitutionally protected privacy interest.” *Loder v. City of
10 Glendale*, 14 Cal. 4th 846, 893 (1997). McCoy does not clear this threshold.

11 **First**, McCoy fails to allege a “legally protected privacy interest.” *Pioneer Elecs. (USA),
12 Inc. v. Superior Ct.*, 40 Cal. 4th 360, 370 (2007). He states neither an informational interest—
13 which pertains to “the dissemination or misuse of sensitive and confidential information” that, if
14 disclosed, could cause “unjustified embarrassment or indignity”; nor an autonomy interest—
15 which shields “intimate personal decisions” from “observation” or “intrusion.” *Id.*

16 Unlike situations in which courts have found a protected privacy interest, McCoy does not
17 allege what extremely sensitive information Google misused or collected, such as by conducting
18 unauthorized tests on blood samples (*Leonel v. Am. Airlines, Inc.*, 400 F.3d 702, 711–12 (9th Cir.
19 2005)); interrogating a middle-school student about her sexual orientation, virginity, and sexual
20 practices (*Botello v. Morgan Hill Unified Sch. Dist.*, No. C09-02121 HRL, 2009 WL 3918930, at
21 *5 (N.D. Cal. Nov. 18, 2009)); accessing and using a sexual-battery victim’s confidential mental
22 health records (*Susan S. v. Israels*, 55 Cal. App. 4th 1290, 1294 (1997)); or disseminating a
23 patient’s positive HIV test results (*Urbaniak v. Newton*, 226 Cal. App. 3d 1128, 1133 (1991)).
24 Rather, McCoy asserts only that Google collected information relating to how often he opened
25 and used TikTok on his phone. Compl. ¶¶ 31, 40. This information, if actually collected, is far
26 from the type of extremely sensitive personal information required to clear the constitution’s
27 “high bar.” *Hill*, 7 Cal. 4th at 35–37.

Indeed, courts have routinely rejected constitutional privacy claims that failed to allege what specific sensitive confidential information was accessed. For example, in *In re Google Location History Litigation*, the court dismissed plaintiffs' privacy claims because they had failed to allege what data Google collected from plaintiffs, never mind that it was purportedly "sensitive and confidential" information. 428 F. Supp. 3d 185, 199 (N.D. Cal. 2019); *see also In re Yahoo Mail Litig.*, 7 F. Supp. 3d at 1040–42 (dismissing constitutional privacy claim because plaintiffs failed to allege that the data Yahoo allegedly collected "actually included content that qualifies under California law as 'confidential' or 'sensitive'").

Second, McCoy has not pleaded that, under the circumstances, he had a reasonable expectation of privacy because the collection at issue was disclosed to him. Google's Privacy Policy discloses that Google may collect "[a]ctivity on third-party sites and apps," and users also have a choice as to whether to share their third-party-app usage data with Google before it is collected. RJD Ex. 2A at 3; RJD Ex 1 at 4. Having consented to the Privacy Policy and Google's disclosures when setting up his device, it is implausible that McCoy could have expected his basic activity information, such as how often he opened and used TikTok on his phone, to remain private from Google in this particular situation. *See In re Yahoo Mail Litig.*, 7 F. Supp. 3d at 1037–38 (finding that plaintiffs must conduct themselves "in a manner consistent with an actual expectation of privacy").

Third, McCoy cannot establish an egregious breach of social norms. McCoy baldly asserts that Google collected and "disseminat[ed]" his "sensitive personal data." Compl. ¶¶ 81, 91-95. He does not, however, plead any *facts* showing that any dissemination actually took place, such as how, to whom, or when any alleged dissemination might have occurred. In the absence of well-pleaded facts, the Court need not accept McCoy's unsubstantiated conclusion that his information was disseminated. *See Iqbal*, 556 U.S. at 679 (concluding that pleadings that are "no more than conclusions, are not entitled to the assumption of truth").

But even if McCoy had so alleged, his claim would fail due to the type of basic activity information that he claims Google collected. Courts have "consistently refused to characterize the disclosure of common, basic digital information," like the app-usage information here, "as

1 serious or egregious violations of social norms.” *In re Google, Inc. Privacy Policy Litig.*, 58 F.
 2 Supp. 3d 968, 985 & n.108 (N.D. Cal. 2014) (citing cases); *see also Moreno v. San Francisco*
 3 *Bay Area Rapid Transit Dist.*, No. 17-CV-02911-JSC, 2017 WL 6387764, at *7-8 (N.D. Cal.
 4 Dec. 14, 2017); *Low v. LinkedIn Corp.*, 900 F. Supp. 2d 1010, 1025 (N.D. Cal. 2012).

5 For example, in *In re iPhone Application Litigation*, 844 F. Supp. 2d 1040 (N.D. Cal.
 6 2012), the plaintiffs alleged that the defendants had systematically collected and disseminated
 7 their “unique device identifier number[s], personal data, and geolocation information from [their]
 8 iDevices,” but the court dismissed those claims because the allegations did “not constitute an
 9 egregious breach of social norms.” *Id.* at 1063. And in *In re Google Inc. Privacy Policy*
 10 *Litigation*, the court analyzed plaintiffs’ allegation that Google had collected personal information
 11 from Android users, associated it with other private user information, and then disclosed the
 12 commingled data to “third-party developers” in ways that allegedly violated “Google’s own
 13 policies.” 58 F. Supp. 3d at 974–75, 987. The court nonetheless dismissed plaintiffs’ privacy
 14 claim, holding that the allegations were not “sufficiently beyond the pale of social norms” to meet
 15 the standard required to plead a constitutional privacy violation. *Id.* at 985. The information at
 16 issue here—how often one uses third-party apps—is basic digital information; collecting it is not
 17 an “egregious breach of social norms.”

18 Accordingly, McCoy’s constitutional privacy claim should be dismissed. As prior courts
 19 have ruled, allowing such a “conclusory and speculative pleading to survive a Rule 12(b)(6)
 20 motion to dismiss would obliterate the ‘high bar’ set for establishing an invasion of privacy
 21 claim.” *In re Google Location History Litig.*, 428 F. Supp. 3d at 199.

22 **D. McCoy fails to state a claim for intrusion upon seclusion.**

23 To state a claim for intrusion upon seclusion, a plaintiff must plead: (1) that the defendant
 24 “intentionally intrude[d] into a place, conversation, or matter as to which the plaintiff has a
 25 reasonable expectation of privacy” and (2) that the intrusion “occur[ed] in a manner highly
 26 offensive to a reasonable person.” *Hernandez*, 47 Cal. 4th 272, 286 (2009). Where, as here, a
 27 plaintiff brings claims for both invasion of privacy under the California Constitution and the
 28 common law tort of intrusion upon seclusion, courts conduct a combined inquiry that considers

1 “(1) the nature of any intrusion upon reasonable expectations of privacy, and (2) the offensiveness
 2 or seriousness of the intrusion, including any justification and other relevant interests.” *Id.* at 288.
 3 Because the “right to privacy in the California Constitution sets standards similar to the common
 4 law tort of intrusion,” courts routinely dismiss these claims together. *Id.* at 287; *In re Google*
 5 *Location History Litig.*, 428 F. Supp. 3d at 199 (dismissing plaintiffs’ constitutional and
 6 common-law privacy claims for the same reasons); *Moreno*, 2017 WL 6387764, at *8 (same);
 7 *Low*, 900 F. Supp. 2d at 1025 (same).

8 McCoy’s intrusion-upon-seclusion claim fails for the same reasons that his constitutional-
 9 privacy claim fails. McCoy does not allege the “*exceptional* kind of prying into another’s private
 10 affairs” that the law requires. *Med. Lab. Mgmt. Consultants v. Am. Broad. Cos., Inc.*, 306 F.3d
 11 806, 819 (9th Cir. 2002). Google’s collection of third-party-app usage data—a collection that is
 12 disclosed to the user—is a far cry from instances where the tort might apply, such as “(1) taking
 13 the photograph of a woman in the hospital with a ‘rare disease that arouses public curiosity’ over
 14 her objection, and (2) using a telescope to look into someone’s upstairs bedroom window for two
 15 weeks and taking ‘intimate pictures’ with a telescopic lens.” *See id.* (citing Rest. (2d) Torts
 16 § 652B, cmt. b.). At most, Google’s collection of third-party-app usage data to build and provide
 17 better services amounts to what courts consider unactionable “routine commercial behavior.” *In*
 18 *re iPhone Application Litig.*, 844 F. Supp. 2d at 1063; *see also Low*, 900 F. Supp. 2d at 1025.
 19 Accordingly, McCoy’s intrusion-upon-seclusion claim should be dismissed together with his
 20 constitutional claim for invasion of privacy.

21 **E. McCoy fails to state a claim under the California Invasion of Privacy Act.**

22 As is relevant here, CIPA punishes a person who, “willfully and without the consent of all
 23 parties to the communication,” attempts to read or learn “the contents or meaning of any message,
 24 report, or communication” in transit over a wire. Cal. Penal Code § 631(a). McCoy has not—and
 25 cannot—plead facts to establish any of these elements.

26 At the outset, McCoy’s CIPA claim fails because McCoy does not allege any “**message, report, or communication**” intercepted by Google. McCoy suggests that Google “secretly
 27 monitors” app-activity data on users’ phones. *See, e.g.*, Compl. ¶¶ 22–23, 30. But nowhere in the
 28

1 Complaint does McCoy allege facts to explain how “monitoring” such app-activity data could
 2 constitute the interception of a “message, report, or communication” by Google. Because CIPA
 3 “require[s] the interception of an electronic communication,” McCoy’s CIPA claim cannot
 4 survive. *Bradley v. Google, Inc.*, No. C 06-05289 WHA, 2006 WL 3798134, at *6 (N.D. Cal.
 5 Dec. 22, 2006); *see also Warden v. Kahn*, 99 Cal. App. 3d 805, 811 (1979) (construing § 631 “to
 6 apply only to eavesdropping by a third party” and affirming dismissal where allegations did not
 7 show that such a communication had occurred).

8 McCoy’s CIPA claim also fails because McCoy does not allege the “**contents**” of any
 9 purported communications allegedly intercepted by Google, as is required under the statute.
 10 Rather, in pleading his CIPA claim, McCoy recites just the legal elements of what the law
 11 forbids—eavesdropping on a “message, report, or communication” while it is in transit. Compl.
 12 ¶¶ 175–77. He then summarily concludes that “Plaintiff and the Class members did not authorize
 13 [Google] to collect the subject information.” *Id.* ¶ 177. The claim includes no factual allegations
 14 to show what the contents of this “subject information” might comprise. Without such
 15 allegations, McCoy’s CIPA claim simply cannot survive. *See Nat’l Ass’n for Advancement of*
 16 *Psychoanalysis v. Cal. Bd. of Psychology*, 228 F.3d 1043, 1049 (9th Cir. 2000) (“Conclusory
 17 allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for
 18 failure to state a claim.”); *see also Brodsky v. Apple Inc.*, No. 19-CV-00712-LHK, 2019 WL
 19 4141936, at *6 (N.D. Cal. Aug. 30, 2019) (dismissing CIPA claim for failure “to identify the
 20 contents of any communication . . . allegedly intercepted”).

21 Finally, even if McCoy could overcome these pleading failures, his CIPA claim would
 22 still fail because the type of usage and activity data he alleges Google collects does not amount to
 23 the “contents” of a “communication” under CIPA. This data is—at best—unactionable “record
 24 information,” which prior courts have found can encompass “user names, passwords, and
 25 geographic location information” (*Brodsky*, 2019 WL 4141936, at *6–7), as well as “information
 26 about a telephone call’s origination, **length, and time**,” (*In re Zynga Privacy Litig.*, 750 F.3d
 27 1098, 1106 (9th Cir. 2014)) (emphasis added).⁵ Viewed in this context, McCoy’s third-party-app

28 ⁵ Although *In re Zynga Privacy Litigation* concerned a claim arising under the federal Wiretap

1 usage data is, if anything, record information and plainly not an intended message conveyed by a
 2 communication. Accordingly, McCoy's CIPA claim should be dismissed. *See Brodsky*, 2019
 3 WL 4141936, at *6 (dismissing § 631 claim alleging the interception of "login activities" because
 4 "login activities" comprise only "record information," not the "contents" of an intercepted
 5 "communication").

6 **F. McCoy fails to state a claim under the California Consumer Privacy Act.**

7 McCoy's CCPA claim fails for two independent reasons. *First*, McCoy fails to allege
 8 facts giving rise to a private right of action under the CCPA. The statute confers a private right of
 9 action "**only**" for violations of subsection (a) of § 1798.150, which pertains to data breaches. *See*
 10 Cal. Civ. Code § 1798.150(a), (c). Specifically, § 1798.150(a) applies to a consumer whose
 11 personal information was "subject to an unauthorized access and exfiltration, theft, or disclosure
 12 as a result of the business's violation of the duty to implement and maintain reasonable security
 13 procedures and practices." *Id.* The statute expressly precludes a cause of action "based on
 14 violations of any other section" of the CCPA. *Id.* § 1798.150(c). It also prohibits a plaintiff from
 15 using the CCPA "to serve as the basis for a private right of action under any other law." *Id.*
 16 Here, McCoy does not allege that his information was subject to a data breach within the meaning
 17 of § 1798.150(a). *See* Compl. ¶¶ 111-12. Instead, he bases his claim on a different CCPA
 18 subsection, § 1798.100(b), but this subsection does not provide a private right of action. *See* Cal.
 19 Civ. Code § 1798.150(c). McCoy's claim under the CCPA therefore fails as a matter of law.

20 *Second*, McCoy has no cause of action under the CCPA because the statute explicitly does
 21 not apply to him personally. Relief under the CCPA is available only to a "consumer," which the
 22 statute defines as "a California resident." *Compare* Cal. Civ. Code § 1798.140(g) with *id.*
 23 § 1798.150(a). Because McCoy is a resident of New York (Compl. ¶ 11), he cannot be a
 24 "consumer" under the CCPA, and he therefore lacks statutory standing.

25
 26
 27 Act, CIPA is California's state-law analogue to the federal Wiretap Act, and courts conduct the
 28 same analysis under both acts. *See Brodsky*, 2019 WL 4141936, at *6 (applying *In re Zynga* to
 § 631 claim); *In re Google Assistant Privacy Litig.*, No. 19-cv-04286-BLF, 2020 WL 2219022, at
 *14 (N.D. Cal. May 6, 2020).

1 **G. McCoy fails to state a claim for fraud.**

2 The elements of fraud giving rise to a tort action for deceit under Civil Code § 1709 are:
 3 “(a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of
 4 falsity (or ‘scienter’); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and
 5 (e) resulting damage.” *Lazar v. Superior Ct.*, 12 Cal. 4th 631, 638 (1996); *see also* Cal. Civ.
 6 Code § 1709. A plaintiff alleging fraud must meet Rule 9(b)’s heightened pleading standard and
 7 define with particularity the basis for his claim, including “the time, place and specific content of
 8 the false representations as well as the identities of the parties to the misrepresentation.”
 9 *Miscellaneous Serv. Workers, Drivers & Helpers, Teamsters Local No. 427 v. Philco-Ford Corp.*,
 10 661 F.2d 776, 782 (9th Cir. 1981). The law requires an exacting standard “to prohibit a plaintiff
 11 from unilaterally imposing upon the court, the parties and society enormous social and economic
 12 costs absent some factual basis.” *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985).
 13 McCoy fails to overcome this pleading bar by any measure.

14 **1. McCoy does not identify any false or misleading statement made by
 15 Google, intentionally or otherwise.**

16 McCoy’s fraud claim vaguely alleges “various acts of deceit,” but points to only two
 17 purported misrepresentations—namely that (1) Google’s Privacy Policy falsely claims that
 18 Google collects data “to provide better services” and (2) Google falsely represents “when users
 19 set up an Android phone” that it collects data “to provide ‘a more personalized experience.’”
 20 Compl. ¶ 101. McCoy asserts that both statements are “objectively false” because the “real
 21 purpose” of Google’s data collection practices is “to gain an unfair competitive edge over its
 22 competitors, such as Tik Tok, Instagram, and Facebook.” *Id.* ¶ 102; *see also id.* ¶ 30 (alleging
 23 that Google collects basic third-party-app usage data to develop a competitor to TikTok called
 24 “Shorts”). Not only does McCoy fail to cite in full the materials from which he cherry-picks
 25 these statements, he also offers no specific facts to explain why these statements are “objectively
 26 false.” Nor can he.

27 Even if one were to accept McCoy’s premise that the collection of basic-activity
 28 information about how often and for how long a user interacts with a third-party app provides

1 Google with some sort of a competitive advantage, McCoy cannot plead a claim for fraud. As the
 2 foregoing discussion of Google's terms and policies demonstrates, Google discloses that it
 3 collects data for a wide range of purposes including, but not limited to, using data to "provide
 4 better services," "maintain & improve our services," "develop new services," and "develop new
 5 products, features and technologies that benefit our users." RJD Ex. 2A at 2, 5-7, 17. Thus,
 6 Google discloses that, of the many reasons Google collects data, one is to develop ***new*** services
 7 and ***new*** products. *Id.* at 5. At best, McCoy offers only "conclusory allegations of fraud . . .
 8 punctuated by a handful of neutral facts," and, in such cases, the law dictates dismissal. *Semegen*,
 9 780 F.2d at 731.

10 **2. McCoy does not adequately allege reliance and resulting damage.**

11 To state a claim for fraud under Rule 9(b), McCoy must also "plead reasonable reliance
 12 on alleged misstatements with particularity by alleging facts 'of sufficient specificity,' allowing a
 13 court to infer that 'misrepresentation caused injury to plaintiffs by inducing them to pay' for
 14 products, or services." *Lintz v. Bank of Am.*, N.A., No. 5:13-CV-01757-EJD, 2013 WL 5423873,
 15 at *5 (N.D. Cal. Sept. 27, 2013). But McCoy's fraud claim lacks any information regarding how
 16 he relied to his detriment on either of Google's two allegedly false statements about third-party-
 17 app usage data collection. Compl. ¶¶ 99-107.

18 In particular, McCoy's fraud claim alleges no facts explaining where he first encountered
 19 Google's two allegedly false statements, or whether he encountered them before he came to own
 20 his Google Pixel XL, before he set up his device, or sometime after that. These omissions are
 21 fatal. *See, e.g., Integrated Storage Consulting Servs., Inc. v. NetApp, Inc.*, No. 5:12-CV-6209-
 22 EJD, 2014 WL 3372583, at *11 (N.D. Cal. July 9, 2014) (dismissing fraud claim where plaintiff
 23 had "fail[ed] to plead reliance on [a] specific statement, or resulting damages from that reliance");
 24 *Cadlo v. Owens-Illinois, Inc.*, 125 Cal. App. 4th 513, 519-20 (2004) (affirming dismissal of fraud
 25 claim where plaintiff failed to plead that he actually "saw" the allegedly fraudulent ads before
 26 purchasing the advertised product).

27 McCoy also does not make clear what "position" Google's purportedly deceitful
 28 statements caused him to alter. Compl. ¶ 104. Nor does he elaborate on how he "would have

1 acted differently” if he had known that Google could use his third-party-app usage data to, among
 2 other things, develop new products. *Id.* ¶ 105. The Complaint lacks any particular facts, for
 3 example, about the circumstances by which McCoy came to own his Google Pixel XL, much less
 4 if or when he himself purchased the device.⁶ And the Complaint also lacks any facts explaining
 5 how McCoy set up his Google Pixel XL and whether he made any changes to the privacy controls
 6 around sharing his third-party-app usage data with Google. It is therefore impossible to evaluate
 7 reliance, the altered “position,” or the resulting injury to which he is referring. As a result,
 8 McCoy falls far short of alleging facts sufficient to state a claim under Rule 8 of the Federal
 9 Rules of Civil Procedure, let alone Rule 9’s requirement that he put Google on notice of the
 10 specific “who, what, when, where, and how” of his fraud claim. *See Vess*, 317 F.3d at 1106; *see also Iqbal*, 556 U.S. at 678 (holding that a claim cannot survive if it contains only a “formulaic
 11 recitation of the elements of a cause of action” or “naked assertions devoid of further factual
 12 enhancement”).

14 **H. McCoy fails to state a claim under the California Legal Remedies Act.**

15 McCoy alleges that Google violated the CLRA by failing to disclose that it “secretly
 16 monitored, collected, and otherwise misused” his unspecified “sensitive personal data while using
 17 non-Google apps.” Compl. ¶ 131. CLRA claims sounding in fraud—like this one—are also
 18 subject to Rule 9(b)’s heightened pleading standard. *See Kearns*, 567 F.3d at 1125. And yet, like
 19 his fraud claim, McCoy pleads his CLRA claim with little more than a verbatim recitation of the
 20 statute’s elements. *See* Compl. ¶¶ 130–36.

21 *First*, as set forth above, McCoy has failed to identify any misrepresentation by Google
 22 with the specificity required under Rule 9(b). *See* Section V(G); *Kearns*, 567 F.3d at 1125.

23 *Second*, McCoy does not allege any qualifying transaction under the statute. “The CLRA
 24 applies only to a limited set of consumer transactions, and is not a law of ‘general applicability.’”
 25 *In re Yahoo! Inc. Customer Data Sec. Breach Litig.*, 313 F. Supp. 3d 1113, 1141 (N.D. Cal.

26
 27 ⁶ Compare Compl. ¶¶ 134, 147, 150, 154 (asserting generally that “Plaintiff and Class”
 28 “purchased” their “Android Smartphone Devices”) with *id.* ¶ 11 (pleading specifically that
 “McCoy is the owner of a Google Pixel XL Android smartphone,” but not that he purchased it, or
 if he did, the circumstances of that purchase).

1 2018). In particular, the statute governs when an allegedly unfair method is employed by a
 2 **“person in a transaction** intended to result or which results in the **sale or lease of goods or**
 3 **services** to any consumer,” Cal. Civ. Code § 1770(a), and which thereby causes that person
 4 “damage,” *id.* § 1780(a). McCoy’s CLRA claim, however, does not identify any specific
 5 “transaction” with Google “for the sale or lease of” a statutorily cognizable good or service, much
 6 less identify the time, place, or manner as to when such a qualifying transaction might have taken
 7 place.

8 **Third**, McCoy does not even identify the good or service upon which his CLRA claim is
 9 based. His claim generically refers to “Android Smartphone devices” and McCoy elsewhere
 10 states that he “owns” a Google Pixel XL. *See* Compl. ¶¶ 11, 19, 31, 134. But, as discussed,
 11 McCoy nowhere alleges that he himself purchased this specific phone from Google or that
 12 Google’s allegedly deceptive statements were made in the course of the transaction to induce him
 13 to purchase that device. These deficiencies doom his claim. *See Schauer v. Mandarin Gems of*
 14 *Cal., Inc.*, 125 Cal. App. 4th 949, 960 (2005) (dismissing CLRA claim brought by wife because
 15 husband, not wife, engaged in transaction).

16 **Fourth**, if McCoy means to construe Google’s Android operating system as the
 17 misrepresented “good,” then he faces at least two insurmountable hurdles. For one, the Android
 18 operating system is free for consumers, and therefore cannot meet the CLRA’s “sale or lease
 19 requirement.” *See Wofford v. Apple, Inc.*, No. 11-cv-0034, 2011 WL 5445054, at *2 (S.D. Cal.
 20 Nov. 9, 2011) (holding that downloads of Apple’s mobile operating system did not meet the
 21 CLRA “sale or lease” requirement because they were provided “free of charge”). For another, the
 22 CLRA does not apply to the sale or lease of software because software is not a “tangible chattel”
 23 and “does not fall within” the CLRA’s statutory definition. *Perrine v. Sega of America*, No. C
 24 13-01962, 2013 WL 6328489, at *3 (N.D. Cal. Oct. 3, 2013); *see also Ferrington v. McAfee, Inc.*,
 25 No. 10-CV-01455-LHK, 2010 WL 3910169, at *19 (N.D. Cal. Oct. 5, 2010).

26 **Fifth**, McCoy also fails to allege adequately that he (1) suffered “damage” (2) “as a result
 27 of” Google’s allegedly inaccurate representations. Cal. Civ. Code. § 1780(a). In *Meyer v. Sprint*
 28 *Spectrum L.P.*, 45 Cal. 4th 634 (2009), the California Supreme Court made clear that a CLRA

1 plaintiff must plead damages in the form of a “tangible” harm. *Id.* at 640–43. McCoy, however,
 2 does not plead facts to explain the tangible injury that he purportedly suffered. And because he
 3 does not identify a specific false representation allegedly made by Google or the circumstances in
 4 which he came to rely on that misrepresentation, he fails to establish any “statutory causal
 5 connection.” *Marolda v. Symantec Corp.*, 672 F. Supp. 2d 992, 1002–03 (N.D. Cal. 2009); *see*
 6 *also In re Google, Inc. Privacy Policy Litig.*, 58 F. Supp. 3d at 982–83 (dismissing CLRA claim
 7 where plaintiff did not allege sufficiently that he had “see[n], read, hear[d] or consider[ed]” the
 8 terms of Google’s privacy policy before creating his account).

9 **Sixth**, McCoy did not comply with California Civil Code § 1780(d), which requires that a
 10 CLRA plaintiff file—“concurrently with the filing of the complaint”—an “affidavit stating facts
 11 showing that the action has been commenced in a county described in this section as a proper
 12 place for the trial of the action.” Because McCoy does not allege or show that he filed any
 13 affidavit, dismissal is mandatory. *See id.* (“If a plaintiff fails to file the affidavit required by this
 14 section, the court *shall* . . . dismiss the action without prejudice.”); *see also In re Apple & AT&T*
 15 *iPad Unlimited Data Plan Litig.*, 802 F. Supp. 2d 1070, 1077 (N.D. Cal. 2011) (enforcing same).

16 **I. McCoy fails to state a claim under California’s Unfair Competition Law.**

17 **1. McCoy has not established statutory standing under the UCL.**

18 In 2004, California voters “materially curtailed the universe of those who may enforce”
 19 the UCL. *Kwikset Corp. v. Superior Ct.*, 51 Cal. 4th 310, 320–21 (2011). For a private plaintiff
 20 to establish standing to sue under the UCL, he must plead an economic injury to his “money or
 21 property.” Cal. Bus. & Prof. Code § 17204. “The intent of this change was to confine standing to
 22 those actually injured by a defendant’s business practices.” *Kwikset*, 51 Cal. 4th at 321. Here,
 23 McCoy alleges that he has “a property interest” in his “sensitive personal data.” Compl. ¶ 128.
 24 But “personal information does not constitute property for purposes of a UCL claim.” *In re*
 25 *Facebook Privacy Litig.*, 791 F. Supp. 2d 705, 714 (N.D. Cal. 2011), *aff’d*, 572 F. App’x 494 (9th
 26 Cir. 2014).

27 Additionally, McCoy lacks standing under the UCL because he fails to satisfy the UCL’s
 28 causation and reliance elements to show he was injured “as a result of” any alleged unfair

1 competition. Cal. Bus. & Prof. Code § 17204. As discussed, McCoy does not sufficiently allege
 2 when he came to rely upon any alleged misstatement by Google, what that misstatement induced
 3 him to do, or what injury it caused him to suffer. Because “actual reliance” is an “essential
 4 element” for UCL standing, this claim fails. *See In re iPhone Application Litig.*, 6 F. Supp. 3d
 5 1004, 1015, 1019–20 (N.D. Cal. 2013) (finding no UCL standing where plaintiffs could not
 6 “point to specific facts indicating that [they] actually saw the misrepresentations about which they
 7 complain, and that those misrepresentations were ‘substantial factors’ in [their] decisions”);
 8 *Perkins v. LinkedIn Corp.*, 53 F. Supp. 3d 1190, 1220 (N.D. Cal. 2014) (dismissing UCL claim
 9 for failure to plead reliance); *Baltazar v. Apple Inc.*, No. C 10-03231 WHA, 2011 WL 6747884,
 10 at *4 (N.D. Cal. Dec. 22, 2011) (same).

11 **2. McCoy’s UCL claims also fail because his predicate claims fail.**

12 McCoy has not pleaded—and cannot plead—fraudulent, unlawful, or unfair conduct as
 13 needed to state a UCL claim. Compl. ¶¶ 120–29.

14 As an initial matter, McCoy’s claim under the fraud prong should be dismissed for the
 15 same reasons as his claim for deceit under Civil Code § 1709—McCoy has not offered a plausible
 16 allegation that Google made an actionable misstatement. *See Section V(G); see also In re*
 17 *Google, Inc. Privacy Policy Litig.*, No. C-12-01382-PSG, 2013 WL 6248499, at *15 (N.D. Cal.
 18 Dec. 3, 2013) (rejecting claim under fraud prong where “documents submitted for judicial notice
 19 undermine any notion that Google failed to disclose its [relevant] practices”).

20 Additionally, McCoy’s claim under the unlawful prong fails because each of his predicate
 21 claims—whether for violation of privacy under the California constitution, intrusion upon
 22 seclusion under the common law, CIPA, the CCPA, or the CLRA—also fail. *See generally*
 23 Section V. As the court held in *Belton v. Comcast Cable Holdings*, conduct that is not barred by
 24 a predicate statute is not “unlawful” under the UCL. 151 Cal. App. 4th 1224, 1234 (2007).
 25 McCoy does not include any alleged violation of the CLRA as a basis for his UCL claim. Compl.
 26 ¶ 121. But Google addresses it here to avoid any doubt. And while McCoy does include his
 27 CCPA claim as a predicate offense, the law forbids him from doing so in this context. *See Cal.*
 28 *Civ. Code § 1798.150(c).*

1 Lastly, McCoy's claim under the unfair prong fails because it cannot overcome the
 2 threshold tethering or balancing tests that McCoy cites.⁷ Compl. ¶ 122. Under the tethering test,
 3 McCoy must show that his claims are linked to violation of a "specific constitutional, statutory, or
 4 regulatory provision." *Backhaut v. Apple, Inc.*, 74 F. Supp. 3d 1033, 1051 (N.D. Cal. 2014). But
 5 McCoy cannot do so because the predicate claims to which he "tethers" his UCL claim also fail.
 6 McCoy cannot avoid his pleading failures on these other claims by repleading the same
 7 allegations and calling them "unfair." *See id.* (dismissing unfair-prong claim tethered to Stored
 8 Communications Act because plaintiff failed to state a claim under that statute); *Herskowitz v.*
 9 *Apple Inc.*, 940 F. Supp. 2d 1131, 1146 (N.D. Cal. 2013) (same re: claim tethered to CLRA).

10 McCoy's success on the balancing test fares no better. In particular, McCoy must
 11 establish that Google's conduct was "immoral, unethical, oppressive, unscrupulous, or
 12 substantially injurious to consumers" and that the harm outweighs the utility of Google's conduct.
 13 *San Miguel v. HP Inc.*, 317 F. Supp. 3d 1075, 1091 (N.D. Cal. 2018). McCoy does not come
 14 close to meeting this standard. Google discloses that it collects information about third-party-app
 15 usage data to, among other things, provide a more customized experience, improve services,
 16 measure performance, and "develop new products, features and technologies that benefit our
 17 users and the public." RJD Ex. 2A at 5–7, 17. McCoy fails to establish or explain why these
 18 benefits are outweighed by any alleged injury to him when he could have easily avoided injury by
 19 choosing not to share third-party-app usage data with Google. Where a plaintiff fails to include
 20 "allegations that go towards comparing the harm to consumers against the utility of Defendants'
 21 conduct," the UCL claim should be dismissed. *Williamson v. McAfee, Inc.*, No. 14-cv-00158-
 22 EJD, 2014 WL 4220824, at *7 (N.D. Cal. Aug. 22, 2014).

23 **3. McCoy cannot seek damages or restitution under the UCL.**

24 UCL plaintiffs may seek only one form of monetary relief: restitution designed to restore
 25 to the plaintiff "any money or property" that the defendant acquired from him unlawfully. Cal.

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⁷ *Lozano v. AT&T Wireless Servs. Inc.*, 504 F.3d 718, 735–36 (9th Cir. 2007) (noting that the
 28 California Supreme Court expressly endorsed the tethering test and rejected the balancing test in a
 competitor action, but holding that federal courts may apply either test in consumer actions
 because California law is "in flux").

1 Bus. & Prof. Code § 17203. McCoy does not plead facts sufficient to show that he paid Google
 2 any money or gave it any specific property. Therefore, his request for monetary relief is not
 3 restitutionary. Where, as here, a plaintiff does not “specify the source or the amount of the
 4 money” that he seeks, and does not “allege any connection between the money [he] spent and
 5 money in [a defendant’s] possession,” dismissal is appropriate. *Phillips v. Apple Inc.*, No. 15-
 6 CV-04879-LHK, 2016 WL 5846992, at *10 (N.D. Cal. Oct. 6, 2016).

7 **J. McCoy fails to state a claim for breach of contract or breach of implied
 8 contract.**

9 **1. Google’s contractual obligations to McCoy are not implied.**

10 Under California law, a contract can be “either express or implied.” Cal. Civ. Code
 11 § 1619. The former is “stated in words,” and the latter “manifested by conduct.” *Id.* §§ 1620–21.
 12 While the elements of proving a breach of contract and a breach of implied contract are the same,
 13 “it is well settled that an action based on an implied-in-fact or quasi-contract cannot lie where
 14 there exists between the parties a valid express contract covering the same subject matter.” *Be In,*
 15 *Inc. v. Google Inc.*, No. 12-CV-03373-LHK, 2013 WL 5568706, at *5 (N.D. Cal. Oct. 9, 2013).
 16 In such an instance, “the express contract controls.” *See id.*; *see also* Cal. Civ. Code § 1625.

17 McCoy recognizes that he entered into a contract with Google, whereby “both parties
 18 agree[d] to abide by Google’s Terms of Service.” Compl. ¶ 138. Google’s TOS is an express,
 19 written, and binding instrument that sets forth the obligations and responsibilities of the parties.
 20 McCoy relies on the very terms of this agreement to state both his breach-of-contract claim and
 21 his *implied* breach-of-contract claim. *Compare id.* ¶¶ 138–45 with *id.* ¶¶ 147–57.

22 There is therefore little doubt that these two contract claims arise from the same subject
 23 matter—and yet, McCoy does not plead either theory of relief in the alternative. As a result, his
 24 breach-of-implied contract claim must be dismissed. *See O’Connor v. Uber Techs., Inc.*, 58 F.
 25 Supp. 3d 989, 1001 (N.D. Cal. 2014) (“[T]here simply cannot exist a valid express contract on
 26 one hand and an implied contract on the other, each embracing the identical subject but requiring
 27 different results and treatment.”); *see also In re Yahoo! Inc. Customer Data Sec. Breach Litig.*,
 28 No. 16-MD-02752-LHK, 2017 WL 3727318, at *47 (N.D. Cal. Aug. 30, 2017) (“[C]ourts

1 routinely allow plaintiffs to plead both express contract and implied contract theories, **as long as**
 2 **those theories are clearly pled in the alternative.”).**

3 **2. Google did not breach any contract entered into with McCoy.**

4 Regardless of whether the Court interprets McCoy’s claim as a breach of express contract
 5 or breach of implied contract, both claims fail because McCoy has not alleged any actionable
 6 breach. *See* Compl. ¶¶ 138–39. Specifically, McCoy does not allege that Google breached any
 7 provision of the Terms of Service or that Google collected any information other than what it
 8 properly discloses in its Privacy Policy. Instead, McCoy alleges that Google breached the
 9 provision of its Privacy Policy that states Google “collect[s] information to provide better services
 10 to all our users.” Compl. ¶ 142. McCoy contends that Google breached this provision because it
 11 did not collect “information to ‘provide better services,’ rather it was to gain a competitive edge
 12 in the market against its rivals.” *Id.*

13 McCoy’s claim rests on a willful misreading of Google’s Privacy Policy. Google
 14 discloses that it collects information, including third-party-app usage data, for a wide range of
 15 purposes—only one of which is to provide better services. *See* RJD Ex. 2A at 2, 5–7. McCoy’s
 16 interpretation that “better services” does not encompass new services or products is implausible.
 17 This interpretation especially collapses in light of the Privacy Policy’s explicit statement that
 18 Google may collect and use data to “develop new services” and “to develop “new products,
 19 features and technologies.” *Id.*

20 In sum, McCoy’s reading of the Privacy Policy is inconsistent with its plain language,
 21 and—whether under an express or implied contract theory—McCoy has not established any
 22 breach by Google. Nor, as discussed above, has he alleged facts sufficient to show how any
 23 alleged breach by Google caused him harm. *See Young v. Facebook, Inc.*, 790 F. Supp. 2d 1110,
 24 1117 (N.D. Cal. 2011) (dismissing breach-of-contract claim where complaint failed to identify
 25 “with any particularity how Facebook breached any obligation it undertook in its Statement of
 26 Rights and Responsibilities”).

27 **K. McCoy fails to state a claim for unjust enrichment.**

28 As with McCoy’s implied-contract claim, “unjust enrichment is an action in quasi-

1 contract, which does not lie when an enforceable, binding agreement exists defining the rights of
 2 the parties.” *Paracor Fin., Inc. v. Gen. Elec. Capital Corp.*, 96 F.3d 1151, 1167 (9th Cir. 1996).
 3 Because McCoy recognizes that he entered into Google’s Terms of Service and that its terms
 4 govern this dispute (Compl. ¶¶ 68, 138), his unjust enrichment claim is barred as a matter of law.
 5 *See Sloan v. Gen. Motors LLC*, No. 16-CV-07244-EMC, 2020 WL 1955643, at *27 (N.D. Cal.
 6 Apr. 23, 2020) (“[T]he mere existence of a contract that defines the parties’ rights bars a claim for
 7 unjust enrichment.”); *see also AdTrader, Inc. v. Google LLC*, No. 17-CV-07082-BLF, 2018 WL
 8 3428525, at *11 (N.D. Cal. July 13, 2018) (dismissing quasi-contract claim where written
 9 agreement covering same subject existed between the parties).

10 In addition, to establish an unjust enrichment claim, McCoy also must show that
 11 Google—by engaging in an “actionable wrong”—obtained a specific benefit at his expense.
 12 *Rojas-Lozano v. Google, Inc.*, 159 F. Supp. 3d 1101, 1120 (N.D. Cal. 2016). But McCoy cannot
 13 do so because, as the foregoing arguments demonstrate, he has failed to allege any actionable
 14 wrong. His unjust enrichment claim should therefore be dismissed. *See Swearingen v. Healthy*
 15 *Beverage, LLC*, No. 13-CV-04385-EMC, 2017 WL 1650552, at *5 (N.D. Cal. May 2, 2017)
 16 (dismissing unjust enrichment claim for same reasons as UCL and CLRA claims).

17 **L. McCoy fails to state a claim for declaratory judgment.**

18 “The Declaratory Judgment Act does not provide an independent theory for recovery; if
 19 the underlying claims are dismissed, . . . then there is no basis for any declaratory relief.”
 20 *Muhammad v. Conner*, No. 10-CV-1449 YGR, 2012 WL 2428937, at *3 (N.D. Cal. June 26,
 21 2012) (citing *Hoeck v. City of Portland*, 57 F.3d 781, 787 (9th Cir. 1995)); *see also* 28 U.S.C. §
 22 2201. Here, McCoy’s request for declaratory judgment should be dismissed because each of his
 23 underlying claims fail. *See* Compl. ¶ 168 (citing other claims as bases for request for declaratory
 24 relief). The claim “may not stand alone.” *Malasky v. Esposito*, No. 16-CV-04102-DMR, 2019
 25 WL 79032, at *10 (N.D. Cal. Jan. 2, 2019), *aff’d*, 781 F. App’x 643 (9th Cir. 2019).

26 **VI. CONCLUSION**

27 McCoy’s Complaint should be dismissed in its entirety. Because its failures cannot be
 28 cured by amendment, Google respectfully requests that dismissal be entered with prejudice.

1 Dated: September 30, 2020

KEKER, VAN NEST & PETERS LLP

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